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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. [redacted] 92

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

ALSO:

PETITION FOR DIMINUTION OF RECORD

LOUIS B. BOUDIN,
Of Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, JOSEPH NISONOFF, respectfully prays that a *writ of certiorari* issue to review the decision of the Court of Appeals of the State of New York, affirming an order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, which said last-mentioned order affirmed a judgment of the County Court of the County of Bronx, in the State of New York, convicting your Petitioner of manslaughter in the first degree.

A

Statement of the Matter Involved

I. Petitioner, a physician, and another physician named Max J. Weinstein, were indicted jointly by an indictment filed in the County Court of the County of Bronx, State

of New York, on December 1, 1942, charging them with the crime of manslaughter in the first degree, in that they had wilfully and feloniously used and employed a certain instrument upon the person of one Madylon McGeehan, a woman pregnant with child, with the intent to procure a miscarriage, and by the use of such instrument inflicted injuries resulting in her death, contrary to the statutes of the State of New York.

The case came on for trial before a Judge of the County Court and a jury, and was tried from March 3 to March 31, 1943, and resulted in a conviction of both physicians; whereupon Petitioner was sentenced to imprisonment for a term of not less than five years nor more than fifteen. The conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, and a further appeal to the Court of Appeals of the State of New York resulted in the decision sought to be reviewed. This decision was rendered on December 30, 1944, and a remittitur containing the decision was thereupon sent by the Court of Appeals to the County Court of the County of Bronx, in accordance with the practice of the State of New York. Thereupon a motion was made by Petitioner in the Court of Appeals to recall the said remittitur, and to have the same amended so as to show that a constitutional question under the Constitution of the United States had been raised, considered and necessarily passed upon by the Court of Appeals. The said motion was granted, the remittitur recalled, and after such recall the remittitur was duly amended to show such fact. The amended remittitur is dated January 16, 1945. A motion was thereupon made for a reargument of the decision on the merits. This motion was denied by an order of the Court of Appeals made March 1, 1945.

II. During the trial, and in order to prove the cause of death, the prosecution offered in evidence the report of an Assistant Medical Examiner of the City of New York

of his findings in the course of an autopsy on the body of the deceased,—the said Assistant Medical Examiner having died in the meantime. The said report was objected to by counsel for your Petitioner as in violation of the right of confrontation guaranteed by both the Constitution of the State of New York and the Constitution of the United States. The said objection was overruled and the report admitted into evidence.

Thereupon, another physician was called and permitted to testify as an expert on the basis of the report made by the Assistant Medical Examiner thus admitted in evidence, as to the cause of death. This question, that is to say, whether the admission of the said report was in violation of the constitutional guarantee of confrontation,—was the only question considered by the Court of Appeals in its opinion accompanying its decision affirming the conviction. The said opinion is annexed as Appendix A to the accompanying brief. The amended remittitur of the Court of Appeals contains the following statement:

> "A question under the constitution of the United States was presented and necessarily passed upon. The appellant contended that the receipt in evidence of the medical examiner's report and the testimony as to the cause of death based thereon violated the due process provision of the Fourteenth Amendment of the Constitution of the United States. This court held to the contrary."

B

The Question Presented

The sole question presented is:

Did the admission into evidence of the report of the Assistant Medical Examiner of the City of New York of his alleged findings during the autopsy performed upon the body of Madylon McGeehan as showing the cause of death, or as a basis for an expert opinion as to the cause

of death of the said Madylon McGeehan, violate the right of confrontation guaranteed to your Petitioner by the Sixth and Fourteenth Amendments to the United States Constitution?

C

Reasons Relied on for Allowance of Writ

The question presented is one of the fundamental rights under the Constitution of the United States and the Articles of Amendments thereof. The right involved, guaranteed by the Sixth Amendment, is one of the basic rights made applicable to trials in state courts by the Fourteenth Amendment. The right has been frequently affirmed by this Court as one of the basic rights guaranteed by the Sixth Amendment; and the applicability of the provisions of the Sixth Amendment with respect to such basic right has been frequently applied by this Court in recent cases to trials in state courts. But the exact question involved in this case has never been passed upon by this Court. And a search of the adjudicated cases would indicate that the particular question has never before been presented to any court as the particular invasion seems never to have been attempted before.

The question presented, therefore, is one of great public interest, in that it is of great importance in the administration of the criminal laws in both the Federal courts and the tribunals of the different States of our Union, and in the safeguarding of the liberties guaranteed by the United States Constitution to those accused of crime.

Your Petitioner therefore verily believes that the application presents a case cognizable by this Honorable Court under the Constitution and statutes of the United States and the rules of this Honorable Court, and one eminently proper for review by this Honorable Court.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, May 25, 1945.

LOUIS B. BOUDIN,
Of Counsel for Petitioner.